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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

No. 870.

ROBERT B. CURTIS, WILLIAM L. CLAY, REV. CHARLES PERKINS, LUCIEN RICHARDS, NORMAN SEAY,
Petitioners,

vs.

WILLIAM BOEGER, Warden, St. Louis City Jail,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

PETITIONERS' REPLY BRIEF.

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PETITIONERS' REPLY BRIEF.

PETITIONERS' REPLY TO RESPONDENT'S STATEMENT OF THE CASE.

Petitioners have found it necessary herein to correct certain factual errors and misstatements of law found in Respondent's Brief in Opposition.

1. On page 2 of his brief, respondent states, "Petitioner Curtis, as president of CORE, announced that the direct action might consist of a sit-in, a stand-in, or a walk-in at the bank so as to interfere with the business of the bank." This statement is not supported by a transcript

page number and is totally false. Furthermore it would be hard to verify the statement since no information is given as to whom the announcement was made or how.

2. On page 3, respondent states, "After hearing Mr. Oldham's explanation, the members of CORE at this meeting held on the evening of August 29, 1963, voted to blockade the bank (Tr. 1159)." The page reference is made to the portion of the transcript containing Mr. Millsap's reading into the record of selected parts of Herman Thompson's deposition as an admission against interest. However, direct evidence at the trial subject to cross-examination indicated that CORE voted to picket the bank and by a separate motion by a count of 18 to 13 voted that individuals could risk arrest by standing at the front door of the bank. The word blockade was not used (Tr. C. 743).

3. On page 5, respondent states, "Petitioners Curtis then called for a show of hands of all persons who were willing to violate the restraining order not withstanding the possibility of punishment." There is no transcript citation for this statement but three witnesses, called by Mr. Millsap, testified that Carl Farris asked for a show of hands (Tr. C. 1497-9, 850, 858, 1428, 1447).

4. On page 5, respondent states, "All persons present raised their hands except attorney Raymond Howard who had advised against violating the restraining order (Tr. 1067)." This statement fails to mention that two witnesses, one a deputy city marshal, stated that none of the petitioners raised his hand (Tr. C. 1428, 1447, 1499). It also fails to mention that, the witness, Denny Walsh, is a reporter for the **St. Louis Globe Democrat**; that during the job campaign at the bank the **Globe** printed numerous smear articles attacking CORE and petitioners; that Denny Walsh, under his own biline, wrote an article in the **Globe** entitled, "Pro-Communist Heavily Infiltrate CORE Leadership" suggesting that several members of the

CORE Advisory Committee including: Rev. Fred Shuttlesworth, Roger N. Baldwin, Rev. Allen Knight Chalmers, Rev. Martin Luther King, A. Phillip Randolph, A. J. Muste and Earl B. Dickerson, are Communists (St. Louis Globe Democrat, December 27, 1963 first installment of a ten part series attacking CORE).

5. On page 5, respondent states, "When the meeting dispersed following the vote, **demonstrators** went immediately to the doors of the bank and stood in front of the doors, linked arms, blocked egress and ingress of customers and employees of the bank, and sat in front of the doors of the bank with locked arms (Tr. 1070). At 5:25 or 5:30 o'clock P. M., the **demonstrators** entered the bank. They milled around inside the bank (Tr. 45). They congregated in front of the teller's cages. They sang loudly and clapped hands in unison. They sat down and laid down on the floor of the bank. They refused to leave the bank." (Emphasis supplied.) While the foregoing statement is not incorrect, the effect is to mislead the reader. By following immediately after a statement about certain individuals the Respondent has failed to make it clear that none of the **petitioners** were among the **demonstrators** or **pickets** who interfered with business at the bank. Furthermore, respondent fails to point out that the overwhelming weight of testimony pointed to the conclusion that at least some of the petitioners encouraged compliance with the court order (Tr. C. Feely: 778, 798, 756, 773; Ford: 855, 856, 859, 875; Kimbrough: 1493; Daly: 1013-14, 1019; Howard: 1421, 1427, 1428; Jones: 1486; Scott: 478).

6. Similarly on page 6, respondent misleads the reader by stating, "At approximately 5:50 o'clock P. M. petitioner Curtis entered the bank and announced, 'We will stay here until six o'clock and then we will go to the Wheatly Y. W. C. A.' (Tr. 52)." The above statement ignores the fact that almost all witnesses, testified that Curtis entered the bank at about three minutes to six to

ask the pickets to "leave" at 6:00—not "stay" until 6:00 (Tr. C. 122, 124, 134, 305, 763, 530, 871, 990, 695). Furthermore, the statement of witness Howard who explained that he, Curtis and Oldham got together at 5:50 to devise a plan to get the pickets out of the bank and decided to use "closing time" as a reason for asking pickets to leave (Tr. C. 1431-33).

7. In spite of the respondent's factual errors of commission or omission, it is important to note that no reference is made to any act of **violence** on the part of any of the petitioners, pickets or CORE members. Or that they threatened, cursed, or intimidated anyone. It is also important to note that no reference has been made to testimony indicating that any of petitioners directed or encouraged anyone to violate the injunction.

ARGUMENT.

I.

Petitioners' Reply to Point One of Respondent's Brief in Opposition.

Respondent's brief contains the following statement on page 11, "The evidence shows petitioners actually voted to defy the restraining order with full knowledge of the possible consequences" (Tr. 1067).

Respondent's support for this statement was the testimony of **Globe-Democrat** reporter Denny Walsh, referred to in the Statement of the Case, ante. Witnesses Howard and Kimbrough stated that none of the petitioners voted to defy the injunction (Tr. C. 1428, 1447, 1499).

But suppose it is true that petitioners did in fact vote to defy the injunction? Is this the only wrongful act that petitioners are accused of committing? And if not what are the additional wrongful acts committed by petitioners and how did these acts or words cause violation of the injunction? Instead of a cause and effect analysis respondent simply states on page 11, "It (the injunction) contains no free speech limitations. The Court of Appeals properly held that petitioners' **conduct** was well beyond protected free speech. Ford v. Boeger, supra, 1007." What conduct? What **specific** acts were petitioners found by the U. S. Court of Appeals to have committed and how many of the pickets reacted to their influence and in what manner? It is clear that respondent and the courts below have failed to make any analysis of petitioners' speech and conduct that satisfies the First Amendment. **Wood v. Georgia**, 370 U. S. 375.

II.

Petitioners' Reply to Point Two of Respondent's Brief in Opposition.

1. Respondent's brief on page 12 asserts that the Court below properly declined to decide whether or not CORE is a "labor organization" or was involved in a "labor dispute" within the meaning of the Act. However, in **New Negro Alliance v. Sanitary Grocery Co.**, 303 U. S. 552, this Court stated at page 561:[1]

> "**The Act does not concern itself with the background or the motives of the dispute.** The desire for fair and equitable conditions of employment on the part of persons of any race, color or persuasion and the removal of discrimination against them by reason of their race or religious beliefs is quite as important to those concerned as fairness and equity in terms and conditions of employment can be to trade or craft unions or any form of labor organization or association. Race discrimination by an employer may reasonably be deemed more unfair and less excusable than discrimination against workers on the ground of union affiliation. There is no justification in the apparent purpose or the express terms of the act for limiting its definition of labor disputes and cases arising therefrom by excluding those which arise with respect to discrimination in terms and conditions of employment based upon differences of race or color." (Emphasis supplied.)

The respondent fails to state how it is possible to decide this point of federal preemption without deciding the basic controlling issues: i. e., the nature of the dispute and whether or not the matter is arguably within the primary jurisdiction of the NLRB.

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[1] See also **NLRB v. Tanner Motor Livery, Ltd.**, 349 F. 2d 1, 3-4.

2. Respondent next asserts that petitioners made an unlawful demand on Jefferson Bank and therefore the federal law does not apply, citing **Adams Dairy, Inc. v. Burke**, 293 S. W. 2d 281, cert. den. 352 U. S. 969, as authority. The **Adams Dairy** case does not apply to the case at bar for several reasons: (1) In **Adams Dairy** the Missouri Supreme Court reversed and remanded a judgment of the lower court which refused to issue the injunction requested. This Court might have denied certiorari because the state court judgment was not a final one. (2) The **Adams Dairy** case was decided several years before **Local No. 438 Construction v. Curry**, 371 U. S. 542, in which this Court stated for the first time that state court injunctions need not be final before the Supreme Court will assert jurisdiction in labor cases. (3) The **Adams Dairy** case is outdated even by Missouri standards since that court stated in **United Brick and Tile Division v. Wilkinson**, 325 S. W. 2d 50 at page 55:

> "So far, except for restraint of violence, the federal decisions have failed to clear this penumbral area in which state injunction power is said to exist. In case after case, approval of state court authority to restrain has been refused.
>
> "In our particular case it should be noted the parties stipulated that the company and its business meets the jurisdictional standard of the National Labor Relations Board. If this be true, then it seems the company should consider seeking relief directly from the Board."

It should be noted that **Adams Dairy** is a pre-**Garmon** case and **Wilkinson** is not.

3. It stands to reason that if state courts are allowed to determine for themselves what is and what is not a labor dispute, state courts could preempt the jurisdiction of the NLRB and assert jurisdiction simply by denying the existence of a labor dispute. This Court has taken the

position that all activities, **San Diego v. Garmon**, 359 U. S. 236, disputes, **Liner v. Jafco**, 375 U. S. 301, and organizations, **Marine Engineers Beneficial Ass'n v. Interlake**, 370 U. S. 173, that are "arguably" subject to the Act must be referred in the first instance to the NLRB.

4. Respondent contends, on page 13, that **Allen-Bradley Local v. Wisconsin Employment Relations Board**, 315 U. S. 740, controls this case. This assertion is erroneous for two reasons: (1) **Allen-Bradley Local** was decided before 1947 when the Taft-Hartley Act imposed restraints on labor conduct and (2) The question of NLRB jurisdiction to police the activities of both labor and management and to prevent picketline disorder of the usual type was decided in **Perry Norvell Co.**, 80 NLRB 225, where the Board said at page 239:

> "By Section 8 (b) (1) (A) Congress sought to fix the rules of the game, to insure that strikes and other organizational activities of the employees were conducted peaceably by persuasion and propaganda and not by physical force, or threats of force or of economic reprisal. In that Congress was aiming at means, not ends."

5. On page 14, respondent states, "Petitioners' charge that the Bank claimed an unfair labor practice under Section 8 of the Act is totally without record foundation or factual support." This statement is disproved simply by looking at the injunction and what activities the bank sought to restrain (See Appendix C of respondent's brief). However, it is true that there is only a small amount of evidence in the record pertaining to the nature of the dispute between CORE and Jefferson Bank. This is true because the trial court refused to permit evidence touching upon the dispute and the U. S. District Court and U. S. Court of Appeals denied an evidentiary hearing on this issue.

6. Finally, on page 15 respondent states, "... if petitioners really believed the charges they made against the Bank, they had adequate recourse through a legal and administrative process established by the State of Missouri (Chapter 296, V. A. M. S.) and the City of St. Louis, Missouri (Ordinance 51512, November 29, 1962, Ch. 482, Revised Code of City of St. Louis) . . . They cannot now claim federal labor protection for their unlawful acts."

Respondent fails to cite any case in support of this contention because the cases hold exactly the opposite of what he contends—that state and federal Civil Rights laws do not preempt the federal labor law.[2] In **Local Union 12, United Rubber Workers v. NLRB**, 368 F. 2d 12, the Court stated at page 24:

> "This problem of overlapping remedies, however, would exist in the absence of recognition of a breach of the duty of fair representation as an unfair labor practice, for undeniably labor practice charges arising under many provisions of section 8 will also involve union and employer conduct proscribed by Title VII. We recognize that while Title VII represents an appreciable addition to the protection afforded employee rights in the specific areas of discrimination covered by the Civil Rights Act, there continues to exist a broad potential range of arbitrary union conduct not specifically covered by Title VII which may also violate the union's duty of fair representation. The comprehensive right of an employee to be represented fairly and in good faith by his exclusive bargaining agent clearly encompasses more than freedom from union discrimination based solely upon race, religion and sex. **The mere fact, therefore, that Congress has seen fit to provide spe-**

[2] See also The Law and Racial Discrimination in Employment, 53 California Law Review 729, 741-750, 781-799.

cific protection to employees from union and employer discrimination in the area of civil rights in no way detracts from the legal and practical bases of our determination that a breach of the union's duty to fair representation constitutes a violation of section 8 (b) (1) (A)" (Emphasis supplied).

In addition the fact that no real alternative existed in Missouri was eloquently stated by the man who is supposed to enforce the Fair Employment Law.[3]

III.

Petitioners' Reply to Point Three of Respondent's Brief in Opposition.

1. Respondent on page 16 states that petitioners did not raise the jury issue in the state courts or the U. S. District Court and therefore the U. S. Court of Appeals properly denied relief. However, petitioners did not be-

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[3] In accepting the Man of the Year Award from the St. Louis Junior Chamber of Commerce on March 11, 1965, Peter C. Robertson, Executive Director of the Missouri Commission on Human Rights, said:

"Before I conclude I must make one last observation on the framework of law here in the State of Missouri. As of now it is just that, a 'framework'. If it is to be meaningful, and if it is to provide the Negro with a legal alternative to demonstrations, and the State of Missouri is determined to solve these problems through law then something solid must be put within the framework. For, just as our legal institutions in the past have not really made any meaningful attempt to obtain equal rights for Negroes so here in the State of Missouri the legislature which passed the Fair Employment Law did not really intend that it be used as a meaningful instrument of obtaining equal rights for our Negro citizens, for they financed it only to the extent of $24,000 a year. $24,000, and permitted the hiring of one man, to cover the entire State of Missouri. That is no alternative! However we are optimistic that the legislature intends to rectify that shortcoming in this session. If they do not then Missouri will face these very serious problems with no meaningful alternative—with no way to honestly urge citizens to use the 'courts and not the streets.'"

gin to suspect that they had a right to a jury trial until the opinion in **United States v. Barnett,** 376 U. S. 681, was announced on April 6, 1964. Petitioners' petitions for writ of habeas corpus was filed in the U. S. District Court on January 31, 1964 and therefore did not contain the jury trial issue.

In footnote 12 of **Barnett** supra at page 696 Justice Clark speaking for the Court indicated that punishment, without jury, might be constitutionally limited to that commensurate with a petty offense. The U. S. Court of Appeals below recognized petitioners' situation by stating at 362 F. 2d at page 1007, "At the time of the trial in 1963, no right to jury trial in criminal contempt cases had been established. See Green v. United States, 356 U. S. 165, 186-87. Doubtless because of this state of the law, no jury trial was demanded." In addition this Court considered the jury trial issue in **Green v. United States,** supra at page 187, where the Court explicitly considered Green's right to a jury trial even though, "petitioners themselves have not contended that they were entitled to a jury trial."

It is clear that petitioners did not waive or fail to assert any right known to them at the time they sought relief in the lower courts.[4]

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[4] In **Patterson v. Alabama,** 294 U. S. 600, Mr. Chief Justice Hughes stated the rule as follows: "We have frequently held that in the exercise of our appellate jurisdiction we have power not only to correct error in the judgment under review but to make such disposition of the case as justice requires. And in determining what justice does require the Court is bound to consider any change either in fact or in law, which has supervened since the judgment was entered. We may recognize such a change, which may affect the result, by setting aside the judgment and remanding the case so that the state court may be free to act. We have said that to do this is not to review, in any proper sense of the term, the decision of the state court upon a non-federal question but only to deal appropriately with a matter arising since its judgment and having a bearing upon the right disposition of the case". 294 U. S. at 607. This quotation was used in the 1964 case of **Robert Mack Bell v. State of Maryland,** 84 S. Ct. 1814.

2. Respondent claims on page 16 that, "Petitioners make no showing that even if the **Cheff** case should apply to state courts as a Six Amendment guarantee by way of the Fourteenth Amendment, it is retroactive."

Respondent has missed the point entirely; the issue is not one of retroactivity. **Cheff v. Schnackenberg,** 384 U. S. 373, is a federal case and this Court has yet to decide whether or not the Sixth Amendment right to jury trial applies to the states through the Fourteenth Amendment. Therefore, there is no newly created right to be retroactively applied to state courts.

The line of recent cases applying the Bill of Rights to the states suggests that in the near future this Court will decide this important matter one way or another. Therefore the real questions are: (1) Does this Court wish to decide the Sixth Amendment-Jury-State issue now? and (2) Is this an appropriate case for this Court to rule on it?

Petitioner Curtis, a member of the Missouri Bar, has his legal career at stake in this proceeding and the rest hold responsible positions in the community and have families dependent upon them for support. All petitioners hope for relief from what they consider a grave injustice; but whether or not this case is selected, it seems obvious that sooner or later this Court will decide the issue presented herein.

IV.

Petitioners' Reply to Point Four for Respondent's Brief in Opposition.

Respondent on page 17, states, "The Court of Appeals held that this matter was fairly heard and determined by the State Court on appeal although the trial record is without a single objection to the Bank's lawyer presenting the evidence of contempt. It was only after the trials and convictions that Petitioners complained."

This statement is totally false as revealed by the following testimony from the transcript of this case in the state court (Tr. C. 730-734):

Page 730:

Mr. Cahill: Now, your Honor, first of all it's obvious from the testimony given here by the witnesses and questions

Page 731:

asked by Mr. Millsap himself that he conducted himself in a most improper manner by going to the home of a sixteen-year-old girl and questioning her in such a manner as to indicate to her that he, the high and mighty prosecutor and representative of a rich and mighty corporation, the bank, had the right to free her from being punished. Now, I think that is highly unethical, Your Honor, and we are asking, first of all, that her testimony, all the testimony that she gave here today be stricken from the record because of the way that it was coerced and brought into this Court. And may we have a ruling on that first, Your Honor?

The Court: Overruled.

Mr. Cahill: Thank you. Now, then, Your Honor, I should like next of all to ask this Court to remove Mr. Millsap from his position as attorney for the Court in this matter and to appoint any other member of this whole Bar to serve in that capacity. We are faced here, Your Honor, with a man who represents the plaintiff bank and who also has set himself up as prosecutor, at the Court's appointment, and he has acted in such an unethical manner that he is now both Judge, jury and executioner of all of these defendants here. They could not possibly have the benefit of the free and equal due process of the law that every defendant is entitled to, because of his unethical conduct, and because of the fact that he represents the bank herein such a manner as to preclude them

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from having a fair trial. And we ask, Your Honor, first of all to remove him from his duty as attorney for the Court. Now, of course he can represent the bank as long as the bank wishes to retain him, but to remove him from his position as attorney for the Court and appoint any other member of the Bar, or any three members of the Bar, and five members of the Bar that the Court chooses.

The Court: Overruled.

Mr. Cahill: Thank you, Your Honor. May the record show that we have made this request, and that we point out to the Court that in matters of this kind where we have a criminal charge where the attorney representing the Court is representing the dignity and majesty of the Court, where we all want to honor and to obey, that now that duty has been given to Mr. Millsap who is a partisan in this matter, who is a party-litigant who represents the bank, and who has now taken his position as a party litigant and counsel for the bank and used that, and used that to bolster his own personal regard as far as the bank is concerned. Now, it may be that in his zeal to represent his clients he has been over zealous, all of us are sometimes, us attorneys get carried

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away with our duties, and of course, if he has done that, it's understandable. I have had occasions, like all lawyers have, to have that temptation. But even though that may be true, Your Honor, we think the rights of these nine defendants out here demands that they be given a fair trial, and it's obvious from his conduct and from the entire course of this trial here, as the record will show, that he has not acted properly, that he has acted as a partisan and not as a prosecutor, that he has forgotten about the rights of these individuals and has concentrated solely and only on one thing, that is, the prosecution and conviction of these persons, while acting

as a private counsel. And further, I would like to point out that he is not acting only as the attorney for the Court, seated behind him is the Executive Vice-President of the bank, Mr. O'Connell. Mr. O'Connell has been here throughout every minute of these proceedings, he has counseled with him, he has talked with him. Mr. O'Connell represents the bank. This is a hearing, not the bank versus CORE, but the People of the Community, through this Court, versus CORE. And instead, the thing has been twisted and subverted so that now we have Mr. Millsap and the bank representing everybody against the poor people of CORE, and they are hopeless. The prosecutor and the judge and the private party have now become all one person. And I ask that he be removed, or that another person be appointed to sit with him and act as

Page 734:

the attorney to prosecute this matter.

The Court: Overruled.

CONCLUSION.

For the reasons herein set out petitioners urge this Court to grant this petition for certiorari to the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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